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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GILBERT ANTHONY RODRIGUEZ, Defendant and Appellant.	B287250 (Los Angeles County Super. Ct. No. BA447872)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne Harwood Egerton, Judge. Remanded in part with instructions and affirmed in part.

Mark R. Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gilbert Anthony Rodriguez shot and killed Gustavo Chamorro during a dispute over a cellphone. A jury rejected defendant's self-defense claim and found him guilty of second degree murder. The jury also found that defendant personally and intentionally discharged a firearm while committing the offense.

Defendant now contends that the trial court erred by allowing a police officer to testify that witnesses who cooperate with law enforcement often fear being labeled as snitches. Defendant argues that the testimony was irrelevant and unduly prejudicial, and that its admission prejudiced him by leading the jury to draw adverse inferences against him. We disagree and affirm the conviction and enhancement finding.

However, we agree with defendant and the Attorney General that this matter should be remanded so the trial court may exercise its discretion under Penal Code section 12022.53, subdivision (h).[1] We accordingly remand the matter for that limited purpose.

PROCEDURAL HISTORY

An information filed on December 28, 2016 charged defendant with one count of murder (§ 187, subd. (a)) and alleged that he personally and intentionally discharged a firearm and caused Chamorro's death (§ 12022.53, subds. (b), (c), (d)). The information also alleged that defendant suffered one prior strike adjudication as a juvenile (§§ 667, subds. (b)-(j), 1170.12) and two prison priors as an adult (§ 667.5, subd. (b)).

A jury found defendant guilty of second degree murder and found the enhancement allegations true. Defendant admitted his

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

priors, which the trial court struck in the interests of justice. The trial court sentenced defendant to 15 years to life on the murder count and a consecutive term of 25 years to life on the section 12022.53, subdivision (d) enhancement; it imposed and stayed sentences on the section 12022.53, subdivisions (b) and (c) enhancements. The trial court imposed various fines and fees and awarded defendant 534 days of custody credit. Defendant timely appealed.

FACTUAL BACKGROUND

I. Prosecution Evidence

A. Background

In June 2016, defendant's uncle, Antonio Rodriguez, operated a business selling second-hand clothing and merchandise. Several of Rodriguez's employees, including victim Chamorro and witnesses Oscar Mata and Doris Mazariegos, lived in makeshift shelters in the backyard of the Los Angeles home Rodriguez owned. Witness Henry Melendez (Henry)[2] rented a room inside Rodriguez's home, and defendant stayed in the basement. Rodriguez's girlfriend, Marilin Presiado, also lived at the home.

B. The Shooting

On June 22, 2016, Mata, Mazariegos, Henry, Presiado, and defendant were at the Rodriguez home sorting clothes and doing other work for Rodriguez. Defendant had been drinking much of the day. Mazariegos testified that he seemed "intoxicated" and looked "kind of mad." Presiado told police defendant was "talking shit about" Chamorro "the whole day," "[s]aying he was scum, a

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[2]To avoid confusion with unrelated investigating officer John Melendez, we refer to Henry Melendez by his first name. No disrespect is intended.

thief," but denied saying those things at trial. Presiado left the property a little before 6:00 p.m. to pick up a pizza.

Chamorro arrived home as Presiado was leaving. Mazariegos heard Chamorro arguing with defendant, first in the front yard of the house and then in the backyard. Mazariegos, Mata, and Henry heard defendant demand in a raised voice that Chamorro call Rodriguez or lend defendant his cellphone so defendant could make the call. Mazariegos, Mata, and Henry all testified that Chamorro refused defendant's demands. Mata heard Chamorro say his phone was not charged, Henry heard him say that defendant needed to learn to calm down and respect his elders, and Mazariegos heard Chamorro tell defendant to leave him alone. Mazariegos and Henry, both Spanish speakers, also heard Chamorro use the Spanish word "machetasos." Mazariegos understood the word to mean something like "to swing a machete." Henry understood it to mean "that [Chamorro] wanted to kill [defendant], to cut him up in small pieces." Presiado, who was not present but also speaks Spanish, testified that "machetasos" means "to hit a person with a machete."

Henry alone testified that Chamorro was holding a machete during the dispute. Henry testified that Chamorro was seated, with a beer in one hand and the machete in the other, hanging by his side near the ground. Henry demonstrated for the jury a pumping motion he saw Chamorro make with the machete. He also described Chamorro as "like desperate to stand up and get [defendant] out using the machete." Henry admitted on cross-examination that he had not told the police that Chamorro was holding a weapon; he explained, "Nobody asked me about it."

After defendant and Chamorro exchanged words, defendant approached Henry and asked him, "Did you see the machete? Did you hear something about the machete?" Henry told defendant that he had heard "something in reference to" a machete but told defendant that he did not want to get involved.

Mazariegos and Mata testified that they saw defendant leave Chamorro and go into the basement. Defendant emerged about a minute later with a rifle, which he pointed at Chamorro. Mata heard Chamorro say, "Don't point it at me." Mata and Henry both heard a shot. Mata testified that defendant "shot at [Chamorro's] feet or something like that," but did not hit him; Mata heard Chamorro say, "Don't play like that." Henry testified that he heard the first shot hit an awning above Chamorro's head. Henry heard someone say, "Oops, I missed." At trial he claimed he did not know who said those words, but he admitted that he told police that defendant said them.

Mazariegos, Mata, and Henry all testified that they then heard five or six shots. Henry saw three red dots on Chamorro's forehead "where the bullets penetrated," and saw blood coming from his nose. Mazariegos heard Chamorro "slam on the floor."

According to Henry, defendant then ran toward him and asked him for his cellphone, which Henry gave him out of fear. Defendant also ran into the house and upstairs, asking other residents for their phones. Mata testified that he saw defendant and Henry running toward him from the area where Chamorro had been, and that all three of them went upstairs, where defendant asked other residents for their phones.

Mata testified that when they came back downstairs, Presiado had returned. Mata told Presiado that defendant had shot Chamorro, and he and Presiado unsuccessfully attempted to

resuscitate Chamorro. Presiado saw Chamorro lying on the ground near his makeshift shelter; he stopped breathing while she was looking at him. Defendant approached Presiado and told her not to call Rodriguez or emergency personnel because he was going to leave. She disobeyed him and called Rodriguez and the police. Defendant left the property on foot when sirens could be heard approaching.

C. Investigation

Los Angeles Police Department (LAPD) officers arrived on the scene around 6:05 p.m. Officer Mauricio Ruiz and his partner cleared the scene and found Chamorro lying on the ground in the backyard. Ruiz and Detective Kenneth Ahn found four spent .22-caliber casings on the ground near Chamorro's body and a .22-caliber Marlin rifle with a scope propped up near the outside door to the bathroom. Ahn also found two additional shell casings in the basement. Ballistics testing revealed that the casings had been fired from the Marlin rifle. Ahn searched the entire backyard and did not find any knives, "bladed objects," or "makeshift weapons." A defense investigator brought a 14-inch machete found among Chamorro's belongings to the LAPD in April 2017.

LAPD Officer Socorro Loza apprehended defendant down the street from the Rodriguez house. Presiado identified defendant in a field show-up. Loza conducted a gunshot residue test on defendant's hands, which came back positive.

LAPD Detective John Melendez testified that he "brought some people back to the station to speak with them" right after the shooting, including witnesses Henry and Presiado. Excerpts of those interviews were played for the jury and admitted into evidence. During his interview, Henry said twice that he heard

defendant say "Oops, I missed." He also said that defendant told him, "Do me a favor. Go upstairs and see that nobody saw this." During her interview, Presiado said that defendant had been "talking shit about" Chamorro all day, and told her that he shot Chamorro "because he deserved it." Both Henry and Presiado said during their interviews that the rifle defendant used had a scope on it, though on the stand Presiado denied making such a statement and Henry said that he was unsure whether the weapon had a scope.

Forensic pathologist Dr. Scott Luzi performed an autopsy on Chamorro. Luzi determined that Chamorro had been shot seven times in the head and torso; the wounds to his head were fatal. Due to a lack of soot or stippling in the wounds, Luzi concluded that the shots were fired from more than three feet away.

II. Defense Evidence

Christian Martinez worked for defendant's uncle, Rodriguez, and lived at his house. He was asked to clean up Chamorro's belongings after the shooting. Martinez found a machete among the belongings, which he moved to a storage unit. He gave the machete to a defense investigator in August 2016.

Criminalist Jessica Gadway testified that she performed a "presumptive screening" on samples of Chamorro's blood after his death. The test was presumptively positive for methamphetamine and negative for other substances. Gadway was not able to draw any conclusions about the amount of methamphetamine in Chamorro's system or any effect it may have had on his behavior.

DISCUSSION

Defendant raises two arguments in this appeal. First, he

contends the trial court erroneously admitted irrelevant and unduly prejudicial evidence that violated his due process rights. Second, he argues that the case should be remanded so the trial court may exercise its new discretion under section 12022.53, subdivision (h). The Attorney General concedes the latter point.

I. Evidentiary Ruling

A. Background

During the prosecution's case-in-chief, the prosecutor asked Detective Melendez about his role in investigating the case. Melendez said that his "initial job was to locate and find the witnesses." The prosecutor asked if that was "an easy task," to which defense counsel objected on relevance grounds. After the court overruled the objection, Melendez said it was not: "Because there was a large crowd and you try to be as discreet as possible and you don't want to front off anyone in front of the rest of the crowd so by speaking with the officers that were there it kind of initially said, hey, kind of described who were the witnesses, kind of told, directed me to them, and I discreetly kind of went to them personally, asked them what they saw, and asked them if they would accompany me to the station."

The prosecutor asked why Melendez asked witnesses to accompany him to the station. Melendez responded, without objection, "You want to take them away from an environment where they feel they don't want to be labeled as a snitch or someone that's getting involved with the investigation." He then clarified what he meant by the phrase "front off": "What I mean by that is I don't want to label that person directly that they are getting involved with the investigation." The prosecutor asked, "why would it be bad for somebody to be seen or perceived as assisting you in your investigation?" Defense counsel objected on

relevance and Evidence Code section 352 grounds. The court overruled the objection, and Detective Melendez stated, "It's plain and simple. The reason is it's - - you don't want to be labeled as someone that's providing information to the police for fear of retaliation." The prosecutor asked Detective Melendez, "How common is that?" He replied, "Very common."

B. Analysis

1. The evidence was relevant.

"The principles governing the admission of evidence are well settled. Only relevant evidence is admissible (Evid. Code, §§ 210, 350), 'and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute.'" (*People v. Harris* (2005) 37 Cal.4th 310, 337.) Relevant evidence is "evidence, including evidence relevant to the credibility of a witness . . ., having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," (Evid. Code, § 210.) "The trial court has broad discretion in determining the relevance of evidence." (*People v. Harris*, *supra*, 37 Cal.4th at p. 337.) We review the trial court's rulings on the admissibility of evidence for abuse of discretion. (*Ibid.*)

Defendant contends that evidence may be relevant to and therefore "admissible on the issue of a *specific* threatened witness's credibility" if the prosecution first "establish[es] the relevance of that witness's state of mind by demonstrating that the testimony is inconsistent or otherwise suspect." He contends the prosecution failed to do that here, and therefore Detective Melendez's testimony was irrelevant and inadmissible. We disagree.

Defendant finds support for his position in *People v. Yeats* (1984) 150 Cal.App.3d 983, 986. However, the Supreme Court disapproved *Yeats* in *People v. Valdez* (2012) 55 Cal.4th 82, 135-136 & fn. 33. Relying on its earlier analysis in *People v. Mendoza* (2011) 52 Cal.4th 1056, 1086, the Supreme Court explained that it had "rejected the view that evidence of a witness's fear in testifying is inadmissible unless the witness's trial testimony is inconsistent with a prior statement." (*People v. Valdez*, *supra*, 55 Cal.4th at p. 135.) "As we explained, 'evidence that a witness testifies despite fear is important to fully evaluating his or her credibility. [Citation.] The logic of this rationale does not hinge on whether the witness gave prior inconsistent testimony.' [*People v. Mendoza*, *supra*, 52 Cal.4th at p. 1086.]" (*People v. Valdez*, *supra*, 55 Cal.4th at p. 135.) "Thus, in order to introduce evidence of the witnesses' fear, the prosecution was not required to show that their testimony was inconsistent with prior statements or otherwise suspect." (*Id.* at pp. 135-136.)

Even if such a showing were required, it was made here. Melendez testified that he interviewed Henry and at the station shortly after the shooting, and the jury heard portions of those interviews that were inconsistent with the testimony they gave at trial. Additionally, Presiado specifically testified that defendant told her not to call the police and that she did not want to be in court testifying against him, and Henry testified that he gave defendant his phone out of fear. Melendez's testimony that he speaks to witnesses discreetly rather than in a public setting because witnesses commonly fear involvement or retaliation was relevant to the jury's assessment of these witnesses' credibility in the public setting of the trial. "Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the

credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court." (*People v. Burgener* (2003) 29 Cal.4th 833, 869.)

Defendant disputes that Melendez's remarks applied to Presiado and Henry, because they "implied that witnesses would have come forward were it not for fear of reprisal," and "Presiado and [Henry] obviously testified." Those witnesses indeed came forward, but there were discrepancies between their private and public statements that Melendez's testimony tended to explain. Moreover, as noted above, both Henry and Presiado expressed at least some fear of defendant, and Presiado expressed reluctance about testifying. Defense counsel did not object to any of those questions or answers.

Defendant also contends that the discrepancies in the witnesses' testimony pertained to "relatively inconsequential matters, and there was no evidence showing that these witnesses' testimony was affected by fear, thus there was no foundation for any of the officer's testimony about fear." We are not persuaded. The trial court did not abuse its discretion by implicitly concluding that the discrepancies were pertinent to the witnesses' credibility, and defendant forfeited any foundation objection by failing to raise it below. (Evid. Code, § 353.)

2. The evidence was not unduly prejudicial

Defendant alternatively argues that even if Melendez's testimony was relevant, the trial court should have excluded it as unduly prejudicial under Evidence Code section 352. He contends that the testimony was devoid of probative value and "achieved nothing other than to harm [him], as it misled the jury

to believe that there must be more damning evidence that the prosecution could not produce and that [defendant] must have had a hand in potential retaliation."

"A trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time." (*People v. Scott* (2011) 52 Cal.4th 452, 490; Evid. Code, § 352.) Evidence is not unduly prejudicial merely because it supports its proponent's position or undermines that of its opponent; that is what makes evidence relevant. (*People v. Scott*, *supra*, 52 Cal.4th at p. 490.) Instead, evidence is unduly prejudicial only where it uniquely tends to evoke an emotional response and has little bearing on the issues. (*Id.* at p. 491.) As with the court's rulings on relevance, we review its rulings under Evidence Code section 352 for abuse of discretion. (*Ibid.*)

The court did not abuse its discretion here. The evidence had probative value to the extent it explained the basis for inconsistencies in witnesses' testimony. It is also highly unlikely that the evidence elicited any sort of emotional response toward defendant. The jury already had heard that Henry was frightened of defendant, and that Presiado did not want to testify. There also was no evidence or even suggestion that witnesses generally fear retaliation or stigmatization by defendants rather than by the community at large. Moreover, defendant's proffered prejudicial inference, "that there must be more damning evidence that the prosecution could not produce," is little more than speculation. The court instructed the jury to consider only the evidence admitted at trial, and we presume the jury followed that instruction. (*People v. Homick* (2012) 55 Cal.4th 816, 873.)

3. Any error was harmless

Even if the trial court did err in admitting the evidence defendant challenges, any error was harmless in light of the limited nature of the testimony and the overwhelming evidence of defendant's guilt.

"A trial court's determinations under Evidence Code section 352 do not ordinarily implicate the federal Constitution, and are reviewed under the 'reasonable probability' standard of *People v. Watson* (1956) 46 Cal.2d 818, 836." (*People v. Gonzales* (2011) 51 Cal.4th 894, 924.) The same is true of its determinations concerning the relevance of evidence, which are made under state law. (See *People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Under that standard, we ask whether it is reasonably probable that the verdict would have been more favorable to defendant absent the claimed error. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

The evidence against defendant was strong in this case. Multiple witnesses observed the altercation between him and Chamorro and heard defendant make incriminating statements during and after the shooting. The casings around Chamorro's body were linked to the rifle that multiple witnesses saw defendant retrieve from the basement. Presiado identified defendant in a field show-up, and defendant's hands tested positive for gunshot residue. Presiado stated during her interview that defendant had expressed hostility toward Chamorro all day prior to the shooting, and the men began arguing as soon as Chamorro arrived home. No machete was found near Chamorro's body, and only one of the three percipient witnesses claimed to have seen him brandish it. On this evidence, it is not reasonably probable that a more favorable

verdict would have resulted but for the challenged evidence.

Defendant contends that the jury's rejection of the prosecution's first degree murder theory nevertheless indicates that it had "problems" with the prosecution case, as does its request for readback of Henry's testimony. He further argues that the jury may have adopted his theories of self-defense or imperfect self-defense had it not heard Melendez's testimony about witness fear of retaliation. We are not persuaded.

As recited above, the evidence against defendant was very strong, and the evidence supporting his theory of self-defense was relatively weak at best. It is unclear why the jury requested readback of Henry's testimony, a request it ultimately withdrew. Indeed, defense counsel agreed with the court that his assertion that the jury wanted the readback to decide between second degree murder and voluntary manslaughter was "pure speculation." What is clear is that the jury had before it evidence that undermined defendant's self-defense theory. Defense counsel even reminded the jury during closing argument that there was no evidence that Chamorro swung the machete, held it in the air, or charged at defendant, and that Chamorro "wasn't pointing it, he wasn't swinging it, he wasn't violently charging my client." There is no reasonable probability that the jury would have concluded otherwise absent Melendez's testimony.

II. Firearm Enhancement

Defendant contends that we must remand the case for the trial court to exercise its discretion to strike his firearm enhancement under section 12022.53. The Attorney General agrees, as do we.

Defendant's sentence included a firearm enhancement of 25 years to life under section 12022.53, subdivision (d). At the time

of defendant's sentencing, prior to the enactment of Senate Bill No. 620, a trial court could not strike firearm enhancements under section 12022.53. (See former § 12022.53, subd. (h) ["Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."]; Stats. 2010, ch. 711, § 5.) However, effective January 1, 2019, Senate Bill No. 620 replaced the prohibition on striking section 12022.53 firearm enhancements with the following: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h); Stats. 2017, ch. 682, § 2.)

Senate Bill No. 620 applies retroactively to nonfinal judgments, such as defendant's. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712.) Absent a clear indication by the trial court as to how it would have exercised its discretion, an appellate court generally must remand for the trial court to hold a hearing to exercise its newly granted discretion. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428; *People v. Rocha* (2019) 32 Cal.App.5th 352, 360-361.) We accordingly remand the matter for the trial court to exercise its discretion whether to strike the enhancement. We express no opinion as to how the trial court should exercise its discretion on remand.

DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court to consider, at a hearing at which the defendant

has a right to be present with counsel, whether to exercise its discretion to strike the firearm enhancement imposed under section 12022.53, subdivision (d). The judgment is affirmed in all other respects.

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COLLINS, J.

We concur:

MANELLA, P. J.

CURREY, J.